Supreme Court, U.S.
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No. 92-1082

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BLACK AND DECKER, INC.,

Petitioner,

v.

JERRY L. ROSS,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Whether this Court should consider Petitioner's claims that it was denied due process or its right to trial by jury in the award of punitive damages where these issues were never raised before the District Court nor in Petitioner's briefs and argument before the Court of Appeals, but were raised for the first time in the Petition for Rehearing? Alternatively, whether this Court should consider Petitioner's newly-raised arguments despite the fact that they are directly contrary to the arguments Petitioner had previously advanced before both the District Court and the Court of Appeals?

2) Whether Petitioner was in fact denied its "due process rights" or its right to "trial by jury" where Petitioner admits that it agreed to the jury instructions which it now claims denied it these rights, where both the District Court and Court of Appeals in fact conducted the precise form of post-judgment review actually sought by Petitioner, and where the Court of Appeals granted a substantial remittitur of punitive damages despite Petitioner's explicit waiver of its request for a remittitur during argument?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully submits this brief in opposition to the Petition for a Writ of Certiorari in this case and asks that the Petition be denied.

STATEMENT OF THE CASE

Petitioner, Black & Decker, begins its request for certiorari by melodramatically proclaiming that "this case presents another instance of punitive damages 'run wild' ", and then suggests that review of the opinion below is warranted because of what Black & Decker characterizes as an "existing conflict among the federal circuits regarding the application of *Haslip* [*Pacific Mutual Life Insurance Company* v. *Haslip*, 111 S.Ct. 1032 (1991)]." (Pet. 2-3)

This claim is truly remarkable—but only because it represents a complete lack of candor in its presentation to this Court. The issues which Black & Decker raises in its petition were never raised before the District Court. They were never raised in briefs or oral argument before the Court of Appeals. They were raised for the first time in the Petition for Rehearing Black & Decker filed in the Seventh Circuit, but then only after an explicit waiver of these issues by its counsel before that Court during oral argument!

Black & Decker is well aware that the question of the timeliness of these arguments is very much an issue in this case. This question was discussed in detail in the Answer to the Petition for Rehearing filed in the Court of Appeals. Any forthright and candid request for review before this Court should therefore have addressed the timeliness of these arguments as a threshold consideration. Failing that, it could be expected that any party that felt free enough to levy such bitter criticism against the trial and reviewing courts for "ignoring" a decision of this Court would have at least tempered some of that criticism

by conceding that it had raised entirely different arguments below and that it had failed to raise these arguments until after both the lower courts had announced their rulings. Indeed, since the decisions of this Court which Petitioner relies upon note that the issue of timeliness is a necessary foundation for raising these particular issues, Black & Decker's failure to even acknowledge this issue in its Petition is especially disturbing.

This Court has admonished litigants who seek to attack an award of punitive damages on these grounds that it will not consider these issues where they are raised in a belated fashion. In *Browning-Ferris Industries* v. *Kelco*, 109 S.Ct. 2909 (1989), this Court declined to consider the question of whether the "size of the [punitive] damages award" violated the constitutional constraints:

> "[b]ecause petitioners failed to raise their due process argument before either the District Court or the Court of Appeals, and made no specific mention of it in their petition for certiorari in this Court." (109 S.Ct. at 2921.)

The Court stated that it would not "attempt to decide the question in the absence of a record on the due process point developed in the District Court and the Court of Appeals." (109 S.Ct. at 2921, fn. 23.) This admonition was repeated in *Haslip*, where the Court said that it would decline to consider these issues when they were "tardily raised." (111 S.Ct. at 1040.) Despite the absence of any such record "developed" below, and despite the fact that these issues were clearly "tardily raised" in this case, Black & Decker blithely presents these same arguments without bothering to address this threshold consideration.

The question of whether these issues *had* been properly preserved for review under the test adopted in *Browning-Ferris* and *Haslip* was hotly contested before the Court of Appeals on Rehearing. Moreover, Black & Decker tacitly

admitted that there was at least a question as to whether these arguments had been preserved when it suggested in its Reply to the Answer to the Petition for Rehearing that the Court of Appeals could consider these issues as "plain error" where they were "voiced for the first time at the appellate level." (Reply, 4) Thus, in light of the express statements by this Court in *Browning-Ferris* and in *Haslip* that it would not consider these issues when they were "tardily raised", the question of whether these issues *had* been preserved for review by this Court *could* and *should* have been addressed by Black & Decker at some point in its request for certiorari. Instead, Black & Decker chose to remain silent on this critical issue, preferring instead to do what it did before the Court of Appeals, reserve its real arguments for its Reply Brief in a rather transparent effort to deny plaintiff the right to fairly address the real issues in this case.

Plaintiff therefore respectfully submits that it is clear that Black & Decker believes that due process is a one-way street. Rather than accord plaintiff the right to "due process" by discussing or even acknowledging the existence of this critical, threshold issue in its Petition for Certiorari, so plaintiff could address that question in his Brief in Opposition, Black & Decker has chosen to pretend that this question simply does not exist. By doing so, it hopes that this Court will give a broad interpretation to its own Rule 15.6 and allow Black & Decker to "respond" to this matter in its Reply as an issue "first raised in the brief in opposition".

This type of tactical maneuvering and gamesmanship has characterized Black & Decker's approach throughout this litigation. This case is hardly an instance of "punitive damages run wild" as Black & Decker suggests. Instead, Black & Decker's defense of this case before both the District Court and the Court of Appeals reflected a coldly-calcu-

lated effort to deflect the attention of the jury, the trial court, and the reviewing court from the undeniable evidence of its willful misconduct by contesting the underlying liability issue only. That defense ignored the entire question of punitive damages, which Black & Decker knew would be more difficult to defend, in favor of what defendant hoped to be the more palatable claim that the accident itself had nothing to do with the alleged defect in its product.

In order to carry out this strategy, Black & Decker never raised any of the arguments which are now presented in the Petition for Certiorari until after this defense failed before the jury, before the District Court, and before the Court of Appeals. Then, and only at that time, did Black & Decker abandon its now-unsuccessful defense on proximate cause and turn to criticism of the trial and reviewing courts for "ignoring" Constitutional claims *that had never been previously raised*!

The fact that Black & Decker had chosen this rather unusual—and perhaps fool-hardy—proximate cause defense was recognized below. As the District Court noted in its opinion, defendant's trial strategy:

> "[w]as to make this a single issue case. It was defendant's contention that the plaintiff brought his hand straight up underneath into the blade of the power miter box saw and thus, that plaintiff's injury would not have been prevented by a right lower blade guard [the specific defect at issue in this case]. Both sides presented evidence on this issue and the plaintiff prevailed." (App. 23a)

Concentrating on its efforts to "make this a single issue case", and to deflect attention away from even the possibility of punitive damages, Black & Decker not only failed to raise any objections to the jury instructions which it now contests before this Court, but went so far as to *agree*

to the manner in which the jury was instructed on the question of punitive damages.[1]

Following this theme in its motion for judgment notwithstanding the verdict or for a new trial, Black & Decker devoted the majority of its arguments in those pleadings to an effort to convince the District Court that a new trial was warranted based on evidentiary rulings. There was no complaint raised as to the jury instructions in light of *Haslip*. No claim of "denial" of the right to "trial by jury" was raised in the post-judgment motions. Indeed, in its post-trial pleadings as well as in its briefs to the Court of Appeals, the *only* reference made to the award of punitive damages rested on the claim that the District Court was required to apply Illinois law in reviewing this issue. Black & Decker never asked the District Court to conduct what it now perceives as a "required" review under *Haslip*, never asked it to include any specific findings along that line in its memorandum opinion, nor did it suggest that the jury should have been allowed to carry out the "role" it now raises in its Petition.

This rather singular strategy continued before the Court of Appeals. Black & Decker did not present any of the arguments it now raises in its Petition in its briefs to the Court. Again, it focused almost exclusively on its "proximate cause" defense. This focus continued during oral argument. With the exception of a short time spent responding to questions, counsel for Black & Decker devoted the rest of his argument before the Court of Appeals to a in-court demonstration of how he believed the accident had occurred. Using this "show-and-tell" method, he tried to persuade the Court of Appeals that the guard which Black & Decker

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[1] Black & Decker concedes that it agreed to the jury instructions in issue here at footnote 2 on page 4 of its Petition.

failed to put on the product until several years later would not have prevented the injury to plaintiff. Counsel for Black & Decker then concluded that no damages—compensatory or punitive—were warranted.

During rebuttal, the Court specifically questioned counsel for Black & Decker as to whether Black & Decker was still seeking a reduction in the amount of punitive damages or whether Black & Decker was simply asking the Court to set aside the entire judgment based upon counsel's in-court demonstration of how he believed the accident occurred. Counsel for Black & Decker, remaining true to Black & Decker's "single issue" proximate cause defense, stated that Black & Decker was not seeking a reduction in the amount of punitive damages, but asked that Court to accept the in-court demonstration as a basis for setting aside the compensatory and punitive damage award in its entirety.

After the Court of Appeals published its opinion, Black & Decker recognized that its "single issue" defense had failed. It filed a Petition for Rehearing which requested review *in banc* of a decision which Black & Decker now criticized as "ignoring" Black & Decker's "due process" and Seventh Amendment rights, even though these issues were raised for the first time in that Petition.

Plaintiff respectfully submits the procedural history of Black & Decker's defense before the District Court and the Court of Appeals prior to the filing of its Petition for Rehearing demonstrates that the true issue in this case is not whether Black & Decker was denied its rights under our Constitution or even whether the decision of the Court of Appeals for the Seventh Circuit is "in conflict" with the decision of other Courts of Appeal interpreting the decision of this Court in *Haslip*. Plaintiff believes that the question that must be decided is whether it will serve

the ends of justice to accept review on behalf of a petitioner who defended this case throughout the proceedings below on purely factual grounds and decided to raise its due process and Seventh Amendment claims for the first time only after that defense failed. Should this Court grant this petitioner the privilege of review where the petitioner's criticism of the decisions below is based on a claim that the lower courts "ignored" allegations of error which this party never bothered to raise before those courts? Should this Court accept review based on a petition which rests almost entirely on a decision of this Court—*Haslip*—which explicitly states that the precise arguments raised in the petition will not be considered where they are "tardily raised" when these claims were clearly raised in a tardy fashion by the petitioner?

Plaintiff respectfully submits that the answer to both questions is the same—certiorari is inappropriate where a party chooses to defend a case on a basis which is quite distinct from and contrary to the "newly-discovered" arguments that it seeks to raise before this Court. If there is truly any deprivation of "due process" inherent in the theories presented by Black & Decker, it is the question of whether due process should be a one-way street rather than a concept which recognizes that justice must be applied in an even-handed fashion.

Black & Decker had every opportunity to present its due process and Seventh Amendment arguments before the District Court. The trial in this case took place several months after the widely-publicized decision of this Court in *Haslip*. Black & Decker then had every opportunity to raise the arguments it now seeks to present to this Court in the post-judgment proceedings before the District Court. It chose not to do so. It also had every opportunity to raise these matters before the Court of Appeals prior to the time it announced its opinion. It again chose not to

do so. It was not until its rather singular defense proved to be a failure that Black & Decker suddenly "discovered" that the jury instructions it *agreed to* and the arguments that it urged the District Court and the Court of Appeals to consider had actually served to deny it "due process" as well as its right to "trial by jury".

It is hardly fair to allow a litigant to bitterly criticize Courts for "ignoring" arguments when that litigant never bothered to raise those arguments at any time before those same courts. It is also hardly even-handed justice to ask the opposing party to respond to the defenses raised by his opponent over a period of many years and then, after spending a long time and a great deal of expense in resolving the litigation, face entirely new arguments which were never presented for consideration when they could have been properly answered if raised in a timely fashion.

This latter point has been overlooked by Black & Decker in its efforts to claim that its "rights" are the only matters that need be considered by this Court. Assuming, *arguendo*, that the procedures which Black & Decker believes should have been employed before the District Court and Court of Appeals had been raised in a timely fashion, the trial court and parties could have submitted jury instructions which would have satisfied Black & Decker's formulation of the requirements mandated by this Court in *Haslip*. Instead of asking to have the trial court do so, or even raising this issue, Black & Decker was content to stand before the trial court and not only allow this purported "error" to take place, but affirmatively contributed to the "error" when it *agreed* to the method and manner of instructing this jury on punitive damages! It then exacerbated the supposed error in this case by failing to request that the District Court conduct the type of review which it now claims was mandated by the decision of this Court in *Haslip* and also when it failed to present that same demand to the Court of Appeals.

In other words, after Black & Decker *affirmatively caused* the so-called errors which it seeks to raise before this Court, it asks the Court to accept review and set aside plaintiff's hard-won judgment on the basis of error placed in the record by the tactical decisions of Black & Decker itself. Is this fair to plaintiff? Does this type of gamesmanship accord plaintiff or any other litigant "due process"?

Of course not!

The manner in which Black & Decker has chosen to treat the lower courts in this case as well as this Court in the manner in which it has raised these arguments in its Petition demonstrates a rather fine disregard for the concept of fundamental fairness which underlies our entire system of justice. Seeking judgment notwithstanding the verdict or a new trial on the basis of error which a party placed in the record through its own acquiescence or silence, and then criticizing the lower courts for "ignoring" arguments which were never presented, should not be considered by this Court as a basis for accepting review.

Plaintiff also respectfully urges that review is not warranted where the perceived conflict between the decision of the Court of Appeals in this case and the decisions of other reviewing courts simply does not exist. As will be discussed in more detail, *infra*, the Court of Appeals rejected Black & Decker's "all or nothing" proximate cause defense, but then independently considered the issue of punitive damages and ordered a remittitur under the standards that comport with the decision of this Court in *Haslip*. Moreover, and contrary to the argument presented by Black & Decker, as the review of punitive damage awards required by Illinois law comports with the type of review set out in *Haslip*, the treatment of this award by the Court of Appeals need not be disturbed by this Court.

Unlike petitioner's view of the West Virginia courts in *TXO Production Corporation* v. *Alliance Resources Corp.*, 419 S.E.2d 870 (W.Va. 1992), *cert. granted*, 61 U.S.L.W. 3206 (U.S. Nov. 30, 1992) (No. 92-479), the Illinois courts do not permit an award of punitive damages based simply on a party's net worth or because a party's conduct may be "bad". The rigorous review of punitive damages required by Illinois law parallels (and even exceeds) the type of review discussed by this Court in *Haslip*. That same intense scrutiny may be found in the opinion of the Court of Appeals in this case, which examined and adopted the appropriate criteria for reviewing an award of punitive damages. Accordingly, the perceived conflict raised by Black & Decker in the Petition does not exist.

As noted by the Court of Appeals in its opinion, this jury decided to award punitive damages based upon the testimony of a former Black & Decker mechanical engineer "who oversaw the design and development of the prototype for the miter box saw." (App. 17a) That witness testified that Black & Decker knew of the potential harm which would result from placing this saw in the stream of commerce without the appropriate guard. "Impatient B&D officials, however, ordered [the witness] to proceed with the saw's development without the right lower guard" rather than delay its sale to the public. (*Id.*)

The Court of Appeals also reviewed evidence which demonstrated that Black & Decker engaged in lengthy correspondence with Underwriters Laboratory seeking to delay new safety standards. Since "products that do not meet UL standards are at a competitive disadvantage, Ross maintains that the delay in B&D's re-design of the saw demonstrates that it was concerned with profits only, and not safety", and therefore was proof of Black & Decker's "flagrant disregard for the safety of the public." (App. 18a)

The Court of Appeals concluded that this and other evidence was "sufficient to support a judgment that B&D's conduct evinced a flagrant disregard for public safety; thus the jury's award of punitive damages was proper." (App. 18a-19a) After it determined that punitive damages were warranted, the Court reviewed the amount of punitive damages in light of the nature and enormity of the wrong, the financial status of the defendant, and the potential liability of the defendant resulting from multiple claims.[2] The Court then noted that all of these factors were not exhaustive as each case must be "carefully assessed in light of the specific facts involved, and the ultimate determination should be governed by the circumstances of each particular case. Moreover, the underlying purpose of an award of punitive damages must be satisfied." (App. 19a-20a) The Court of Appeals also very clearly couched its review of punitive damages in light of the principle that because of their "penal nature, punitive damages are not favored in the law, and courts must be cautious in seeing that they are not improperly or unwisely awarded." (*Id.*)

With these principles in mind, the Court of Appeals reduced the amount of punitive damages awarded by the jury from $10,000,000 to $5,000,000. In doing so, the Court observed that Black & Decker not only had a net worth of $1,933,608,000, but also that the company had obtained a profit of more than $51,000,000 in 1990 from the sale of power tools alone. (App. 20a) Focusing on this figure, an appropriate consideration in light of the fact that those profits were based in large part on the sale of this saw without the required guard, the Court of Appeals reduced

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[2] The opinion of the Seventh Circuit notes that Black & Decker never raised the issue of multiple claims in regard to these damages, and the Court could not consider this factor in the absence of any evidence or argument on the issue.

the award from $10,000,000 to $5,000,000 as representing "roughly ten percent of B&D's 1990 power tool profits". The Court believed this reduced amount would "serve the twin purposes of punishment and deterrence" by preventing Black & Decker from behaving "in a like manner again" and also put a "sufficient dent in its profits to serve as a fitting punishment." (App. 21a)

How does this analysis conflict with the principles adopted by this Court in *Haslip*? Plaintiff respectfully submits that there is no conflict. The jury award in this case, as well as the post-award review by both the District Court and the Court of Appeals, demonstrates that the award was not the result of "caprice, passion or prejudice," but that it was assessed—and later reduced—based on considerations which clearly comport with *Haslip*. This award, even as reduced on appeal, bears a very real and very understandable relationship not only to the enormity of the conduct, but also to the *undisputed* award of compensatory damages in the amount of $2,000,000 by the same jury.[3]

The only other basis for potential review raised by Black & Decker in its request for review is the claim that the

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[3] Black & Decker *never* challenged the award of compensatory damages as excessive nor did it even mention the word remittitur with regard to these damages at any time. Accordingly, the reduced amount of punitive damages in this case are two and one-half times the amount of the unchallenged and appropriate award of compensatory damages. Plaintiff urges that such an award is not an example of "punitive damages run wild" as Black & Decker suggests. The award also bears a reasonable and rational relationship to the *profits* obtained in just one year from the sale of the defective product that caused the injury. As this saw remained on the market for *several years* in this condition, punitive damages which are two and one-half times the amount of compensatory damages and which leave the wrongdoer with 90% of the profits gained by its misconduct in a *single year* are hardly an example of "punitive damages run wild".

decision of the Seventh Circuit in this case employs a "constitutionally flawed state post-verdict review criteria" as these issues were not "submitted to the jury through instructions." (Pet. 15) This argument is itself erroneous. Further, it should be weighed in light of the fact that Black & Decker concedes in footnote 2 on page 4 of the same Petition that the "parties agreed" upon the "punitive damage jury instruction that the district court submitted to the jury." The concession that Black & Decker "agreed" to the jury instructions on punitive damages given in this case demonstrates far more eloquently than anything plaintiff may say why review is not warranted in this case.

Black & Decker claims that following *Haslip*, "a district court sitting in diversity must instruct the jury on the totality of the substantive state law of punitive damages", including "post-verdict factual considerations." (Pet. 14) Defendant states that the "Seventh Circuit employed constitutionally flawed state post-verdict review criteria that were not submitted to the jury through instructions" and, as a result, that Court "usurped the function of the jury in contravention of Black & Decker's Seventh Amendment rights by making findings of fact pursuant to state-law criteria never considered by the jury." (Pet. 15)

Black & Decker's claim that it was denied its Seventh Amendment rights to trial by jury when the jury was not permitted to consider what Black & Decker now asserts were "proper" instructions flies in the face of its carefully-hidden concession that this jury considered the question of punitive damages on the basis of instructions that were "agreed upon" by the "parties". Having agreed to giving these instructions *several months after the announcement of Haslip*, Black & Decker's conduct was the effective cause of the purported "error" which it now seeks to have reviewed by this Court!

It is respectfully urged that a party may not agree to giving jury instructions and then, following a verdict which is returned on the basis of such purportedly "erroneous" instructions, claim that it was "error" to give those instructions or fail to give others *which it never bothered to tender to the jury*. It is further urged that where the "failure" to give those instructions is *not* raised in its motion for judgment notwithstanding the verdict or for a new trial, is *not* raised in its brief and argument before the Court of Appeals, but is raised *for the first time* in a Petition for Rehearing years after the jury reached its verdict on the basis of these supposedly-erroneous instructions, that the issue has not been preserved for review.

Again, plaintiff respectfully, but also most emphatically, urges that this request for review should be denied where it is presented to this Court based on non-existent error created *solely* not by the harshly-criticized lower courts, but by the petitioner itself.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S ARGUMENTS HAVE NOT BEEN PROPERLY PRESERVED FOR REVIEW BY THIS COURT AND, IF ACCEPTED, WOULD SERVE TO DENY PLAINTIFF EVEN THE SEMBLANCE OF THE SAME RIGHT TO "DUE PROCESS" INVOKED BY PETITIONER.

Petitioner, Black & Decker, asks this Court to consider two issues: First, whether the award of punitive damages in this case was allowed to stand when the lower courts reviewed these damages in a manner that Black & Decker believes was contrary to the "post-verdict review criteria approved by this Court in *Pacific Mutual Life Insurance* v. *Haslip*, 111 S.Ct. 1032, 1043 (1991)", thereby violating Black & Decker's "due process rights." (Pet. i); Second,

Black & Decker claims that the appellate "post-verdict review of the punitive damage award violates Black & Decker's Seventh Amendment right to a trial by jury." (*Id.*)

Both of these arguments were raised for the first time in the Petition for Rehearing and Suggestion, in the Alternative of Rehearing *in banc* presented to the Seventh Circuit after that Court had announced its decision affirming the award of compensatory damages but reducing the award of punitive damages by one-half. As such, plaintiff respectfully submits that these issues have not been preserved for review by this Court.

In *Browning-Ferris Industries* v. *Kelco*, 109 S.Ct. 2909 (1989), this Court stated that it would not consider questions relating to punitive damages where the petitioner had failed to raise this type of challenge before either the District Court or the Court of Appeals. (109 S.Ct. at 2921.) The Court in *Browning-Ferris* also stated that mere general objections or non-specific arguments would not be considered by the Court as sufficient to preserve these arguments for review. As Mr. Justice Blackman observed in that opinion, the Court would not "assume that a non-constitutional argument [objection] also includes a constitutional one", stated that the Court would not assume that the necessary objections had been made, and concluded that the Court would not "attempt to decide the question in the absence of a record on the due process point developed in the District Court and the Court of Appeals." (109 S.Ct. at 2921, fn. 23.)

This Court agreed to consider the issue of punitive damages in its later decision in *Pacific Mutual Life Insurance Company* v. *Haslip*, 111 S.Ct. 1032 (1990), but did not retreat from its admonition that it would not consider these issues when raised in the absence of a complete record at the trial level nor where these arguments were

otherwise "tardily raised". (111 S.Ct. at 1040.) Despite the fact that Black & Decker engages in a lengthy—albeit inaccurate—analysis of the *Haslip* decision and its application by various other courts in its petition, it has carefully avoided any discussion of the critical question of timeliness in its presentation to this Court. It has done so because it knows full well that these issues have *not* been preserved in this case.

In *Browning-Ferris*, this Court stated that it would not assume that a non-specific objection also contained a specific constitutional challenge, nor would it attempt to decide such questions in the absence of a record "on the due process point developed in the District Court and the Court of Appeals." No such "constitutional objections" to the award of punitive damages or the manner in which these damages were awarded (or later reviewed) appears anywhere in the record of the trial in this case nor in the record of proceedings before the Court of Appeals prior to the belated introduction of these matters on Petition for Rehearing.

The motion for judgment notwithstanding the verdict or for a new trial pursuant to Federal Rule of Civil Procedure 50(b), as well as the supporting Memorandum of Law submitted by Black & Decker to the District Court are reproduced in full as an appendix to this brief. If this Court wishes to do so, it can review those pleadings and see that not *a single word* regarding the decision of this Court in *Haslip* appears in those documents. Further, not a *single reference* to any of the arguments now presented by Black & Decker appears in either the motion or the supporting memorandum. Moreover, while it is not practical to reproduce the entire transcript of proceedings as well as the common law record developed during the trial, suffice it to say that a review of the transcript and the record below would also reflect not one reference to *Haslip* or

to any of the arguments now presented in Black & Decker's petition to this Court.

Since it is anticipated that Black & Decker will take advantage of its right to file a Reply Brief to "respond" to what it will characterize an argument being "first raised in the brief in opposition", the response given by Black & Decker to this same issue before the Court of Appeals must be addressed by plaintiff in this brief. When the fact of Black & Decker's patent waiver of these issues was presented to the Seventh Circuit in the Answer to the Petition for Rehearing filed in that Court, Black & Decker sought to file a Reply to the Answer. In that document, Black & Decker claimed that its motion for judgment notwithstanding the verdict and motion for new trial established that it did object to the "punitive damages award on the ground of excessiveness due to the lack of proportionality to the conduct involved and the severity of the injury incurred", referring the Court of Appeals to pages 6 and 7 of that motion. (Reply 3) Assuming that Black & Decker presents the same factual response that it did before the Court of Appeals in its Reply Brief to this Court, turning to pages 6 and 7 of the motion for judgment notwithstanding the verdict and motion for new trial, this Court will not find any reference to punitive damages whatsoever. The argument on those pages is devoted instead to a discussion of various trial error which was later rejected by both the District Court and the Court of Appeals.

Assuming that Black & Decker erroneously referred the Court of Appeals to its motion rather than to its memorandum in support of its request for judgment notwithstanding the verdict, pages 3 through 8 of that memorandum discuss the issue of punitive damages—but do *exclusively* in light of Illinois law. Again, not only is the word "proportionality" conspicuous by its absence, but the District Court was never asked to consider any claim of deprivation of

due process, deprivation of any right guaranteed under the Constitution of the United States, or to consider the potential impact of the decision of this Court in *Haslip* on the issue of the imposition, review, or determination by a jury of the question of punitive damages. The discussion of punitive damages in the memorandum of law presented by Black & Decker to the District Court rests exclusively on a discussion of Illinois law after it begins with the statement that in a "diversity action, State law determines whether punitive damages are allowed." (Memorandum 3, citing *In Re Aircrash Disaster Near Chicago*, 644 F.2d 594, 605-06 (7th Cir. 1981).)

The issues Black & Decker seeks to raise before this Court were thus clearly never developed or even addressed before the District Court. Were they then raised before the Court of Appeals before it announced its opinion?

Of course not!

The specific arguments now presented by Black & Decker to this Court appear nowhere in the more than 70 pages of briefs submitted to the Court of Appeals.

Black & Decker's initial brief in the Supreme Court was 50 pages in length. At page 35 of that brief, a reference to the decision of this Court in *Haslip* appears for the first and only time in a one-paragraph, conclusory argument that the award of punitive damages in this case "violated the due process clause of the United States Constitution." Defendant stated that the "circumstances of the case violated the standards set forth in *Haslip* inasmuch as the trial court did not provide any guidance or otherwise provided a sufficiently definite and meaningful constraint on the discretion of the jury." (Br. 35.) *No reference whatsoever appears in this paragraph nor anywhere else in defendant's brief to the question of jury instructions, the propriety of the instructions under Illinois law, nor a potential conflict between the Illinois law and Pacific Mutual v. Haslip!*

The question of jury instructions *was* raised by Black & Decker in its Reply Brief, but then only in a three-sentence addition to its prior conclusory argument. Again, the arguments Black & Decker raises in its petition to this Court do not appear in this brief. The sole reference to instructions was as follows:

> "For instance, the court did not instruct the jury that evidence of post-manufacture changes should only be considered as to the issue of feasibility and not to punitive damages. Hence, the instructions to the jury did not act as a constraint on its discretion. Furthermore, as noted above, the award is unreasonable inasmuch as it was five times more than the amount of the Plaintiff's compensatory damages and there is no evidence that the conduct in question rose to the level of reckless disregard." (Rep. 14.)

During the oral argument, counsel for plaintiff was asked several questions by members of the panel regarding the amount of punitive damages. In response to one question relating to the amount of *compensatory* damages, counsel for plaintiff pointed out that Black & Decker had raised no complaint as to the amount of compensatory damages and that, while it claimed that the amount of punitive damages was "excessive," it had never specified what amount it sought in a remittitur or by what extent punitive damages *should* be reduced. During colloquy with the Court, counsel for plaintiff pointed out that if anyone was being deprived of a constitutional right to address the question of punitive damages, it was plaintiff who was forced to respond to a general request for a remittitur without having any specific amount to respond to as "proper" or "appropriate."

When counsel for Black & Decker rose to give his rebuttal, he was specifically asked by the Court whether Black & Decker was complaining about the amount of punitive damages or whether Black & Decker was simply claim-

ing that no punitive damages at all were appropriate. Counsel for Black & Decker stated that his client was not asking for a *reduction* in the *amount* of punitive damages, but claimed instead that no punitive damages should have been awarded at all.

In light of this repeated and explicit waiver of this issue, Black & Decker's attack upon the opinion of the Court of Appeals is particularly unfortunate. Just as Black & Decker attacked the trial judge in its briefs before the Court of Appeals for ruling against it when much of the so-called error was self-generated by what the Court of Appeals correctly labeled as "tactical errors" (App. 10a), its free-wheeling attacking the Court of Appeals for supposedly "failing" to consider arguments which were *never presented* goes beyond the bounds of advocacy. Plaintiff respectfully submits that review should not be accepted under such circumstances.

Plaintiff believes that it is abundantly clear that the arguments now raised by Black & Decker were indeed "tardily raised". While plaintiff believes that this waiver should be sufficient to preclude review of these arguments by this Court, he also respectfully submits that considering these arguments now would deny him his own right to due process and fundamental fairness before the courts.

Black & Decker asserts that the review procedures adopted by both the District Court and the Court of Appeals were erroneous in light of what it believes were different procedures to be employed pursuant to the decision of this Court in *Haslip*. However, Black & Decker consistently urged both the District Court and the Court of Appeals to apply the punitive damage review procedure adopted by the *Illinois* court system. At no time did it ever raise any of the specific arguments presented in its petition to this Court before either the District Court or the Court of Appeals.

At each stage of the proceedings below, these arguments *could* and perhaps *should* have been raised by defendant. It chose not to do so, effectively denying plaintiff his own right to a fair trial and due process of law where this matter remained before the court system for several years, was resolved first by a jury and then reviewed by the District Court, and then presented to the Court of Appeals in hotly-contested briefs and oral argument directed to issues quite distinct from those now presented to this Court. It was only when it was no longer possible to "cure" any possible trial error, that Black & Decker belatedly "discovered" that both the District Court and the Court of Appeals were guilty of "ignoring" *Haslip*.

Black & Decker apparently believes that it has a right to litigate a matter for several years, take its chances before first a jury and then a reviewing court, and then decide to change its defense strategy and raise new arguments which it never gave its opponent or the courts a chance to consider. It was hardly just for Black & Decker to withhold these arguments at a time when they could have been considered by the lower courts and applied, if proper, before the entry of judgment. Failing that, they could have been raised in the post-judgment review process which Black & Decker now complains was performed in an improper fashion. Of course, these arguments surely could have been presented to the Court of Appeals in a timely manner if Black & Decker believed that the Court of Appeals was required to apply some form of review *other* than that which Black & Decker explicitly asked it to adopt in its briefs.

Of course, Black & Decker chose to take none of these steps, preferring to wait to see if its alternative strategy would bear fruit before switching to its latest efforts in the Petition for Rehearing in the Court of Appeals. The justice of this approach eludes plaintiff, who can only state

that if Black & Decker seriously believes in this formulation of due process, then the award of punitive damages in this case should never have been reduced in favor of a defendant who seems to believe that it can treat the Courts and its fellow citizens in such a shameless fashion.

Black & Decker was not denied due process or its right to trial by jury by either plaintiff or the lower courts in this case. Any arguable deprivation (which does not exist) was a result of trial strategy or, as stated by the Court of Appeals, "tactical errors" engaged in by a defendant who gambled everything on setting aside an entire verdict rather than attempt to deal with the unpalatable but overwhelming evidence of its willful misconduct.

II.

THE REVIEW PROCEDURE ADOPTED BY THE DISTRICT COURT AND COURT OF APPEALS IN THIS CASE IS NOT CONTRARY TO *HASLIP* NOR IN CONFLICT WITH ANY DECISIONS OF THE OTHER COURTS OF APPEAL WHICH HAVE FOLLOWED THE *HASLIP* DECISION.

Turning to the "merits" of Black & Decker's argument, it claims that the District Court "denied Black & Decker's post-trial motions without reflecting its reasoning" and also that the "Seventh Circuit upholds the methodology employed by the District Court in disposing of Black & Decker's post-trial motions on punitive damages." (Pet. 7-8) Nothing could be further from the truth.

The decision of the District Court is admittedly sparse. However, that decision reflected the emphasis given by defendant to everything but the issue of punitive damages at trial. As the District Court noted in its opinion, defendant's "trial strategy was to make this a single issue case. It was defendant's contention that the plaintiff [had not been injured in the manner that he claimed and that the

defect in defendant's saw was not the proximate cause of his injury.] Both sides presented evidence on this issue and the plaintiff prevailed." (App. 23a) In light of the fact that Black & Decker in the motion for judgment notwithstanding the verdict and motion for new trial, along with its supporting memorandum, spent virtually no time discussing the question of punitive damages, the District Court's purported "failure" to consider the non-arguments presented by Black & Decker is easy to understand. Rather than "ignore" Black & Decker's formulation of the review procedure required by *Haslip*, the District Court simply addressed the arguments presented to it by Black & Decker, resolving them in favor of plaintiff and against Black & Decker.

The treatment of punitive damages by the Court of Appeals was quite lengthy and comports with the review procedures discussed by this Court in *Haslip*.[4]

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[4] Although the petition filed by Black & Decker before this Court focuses on the question of punitive damages, Black & Decker is not content to restrict its criticism of the Court of Appeals solely to its treatment of punitive damages. In footnote 3 at page 6 of the petition, this Court is referred to the fact that the Court of Appeals purportedly "failed to address the effect of the District Court permitting respondent to introduce evidence of two subsequent injuries involving Miter saws." Black & Decker claims that under Illinois law, "post-occurrence evidence is inadmissible on punitive damage liability, and should not have been considered by the jury on that question." (*Id.*)

This criticism of the Court of Appeals is particularly reprehensible in light of the fact that the Court of Appeals *did* address this question when it reviewed the manner in which Black & Decker treated the question of feasibility at trial. At page 10 of its opinion (App. 10a), the Court of Appeals noted that under Rule 407, "post-manufacture remedial measures are admissible if the manufacturer disputes the feasibility of remedial measures." The Court of Appeals notes in its opinion that although Black & Decker claimed that it had "admitted the feasibility of the remedial measures it later took", that this claim was a patent misstatement since this

(Footnote continued on following page)

The Court of Appeals devoted six pages of its 21-page opinion to the issue of punitive damages, despite the fact that it first had to deal with the plethora of supposed trial error raised by Black & Decker. That treatment, which came after the explicit waiver of the issue of punitive damages by Black & Decker's counsel during oral argument, clearly comports with the decision of this Court in *Haslip*.

At page 10 of its petition, Black & Decker states that following *Haslip*, "federal courts have measured state post-verdict review standards against *Haslip* to ensure that any punitive award is constitutionally grounded." Black & Decker then argues that Illinois law rejects the "proportionality" requirement of *Haslip* and states that an Illinois court will not disturb a punitive damage award "unless the award is the result of 'passion, partiality or corruption.' " (Pet. 12) Black & Decker states that this Court and other intermediate federal reviewing courts have held that this standard is "constitutionally deficient in the absence of a full panoply of Alabama-style due process protections" as approved by this Court in *Haslip*. (*Id.*)

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[4] *continued*

admission "occurred during adverse examination by the plaintiff of the defendant's expert *after* evidence of the subsequent remedial measures had been introduced by the plaintiff." (*Id.*, emphasis in original.) The Court of Appeals concluded that the defendant could have stipulated to the feasibility or included the admission of feasibility as an uncontested fact in its pretrial memorandum. Its failure to do so was an extension of its "single issue" strategy and, according to the Court of Appeals, was another instance of a "tactical trial error" created by defendant itself rather than committed by the trial court. (App. 10a)

Why Black & Decker persisted in even raising this issue, and why it persists in presenting it in the same false fashion already rejected before the Court of Appeals, is indeed a mystery.

The manner in which Illinois law treats punitive damages is not in conflict with the decision of this Court in *Haslip*. Just as this Court declined to adopt any rigid "proportionality" test in *Haslip* or hold that there is some constitutionally-mandated compensatory/punitive ratio, the Illinois courts have rejected the same rigid proportionality test. However, Illinois has long-since adopted standards which are even more vigorous than those adopted in Alabama or by this Court in *Haslip*. These standards are reflected in the opinion of the Court of Appeals in this case.

Under Illinois law, a jury is not even permitted to consider the issue of punitive damages until a trial court makes a preliminary finding that the circumstances of a given case warrant the imposition of such damages. That requirement predates the decision of this Court in *Haslip* and the adoption of less rigorous procedures by the courts of the State of Alabama. The same rigorous scrutiny is required following the award itself.

This early and rigorous review of punitive damages was first recognized by the Illinois courts in *Moore* v. *Jewel Tea Company*, 46 Ill.2d 288 (1970), cited most recently by the Illinois courts in *Loitz* v. *Remington Arms Company*, 138 Ill.2d 404 (1990). Under this test, the Illinois courts have repeatedly struck down punitive damage awards where they are improvidently awarded by juries under circumstances which the trial or reviewing courts later believe are inappropriate.

Rather than give jurors free reign to award punitive damages based upon whim or the eloquence of a plaintiff's counsel, the courts of Illinois recognize that because of their "penal nature, punitive damages are not favored in the law" (*Loitz* v. *Remington Arms Company*, 138 Ill.2d at 414), the "initial decision of whether punitive damages may be imposed in a particular case in this State is a matter normally reserved to the trial judge." (*Id.*, citing *J.I.*

Case Company v. *McCartin-McAuliffe*, 118 Ill.2d 447, 453 (1987).) The award is then reviewed again after the verdict and, as in *Loitz*, freely set aside if inappropriate or excessive.

While it is outside the scope of the present brief to engage in a lengthy analysis of Illinois law on the question of punitive damages, the law of Illinois as discussed in the Opinion of the Court of Appeals clearly goes far beyond that of Alabama in its effort to ensure that punitive damages are subject to rigorous judicial control. That rigorous control is also reflected in the lengthy discussion of this issue by the Court of Appeals in this case, and in its reduction of punitive damages by one-half under its analysis of Illinois law.

The Court of Appeals cited both *Loitz* and *J.I. Case* as guiding its determination to carefully review the award of punitive damages in this case. At pages 17 through 19 of its opinion, the Court of Appeals weighed these factors in light of the evidence that Black & Decker was advised by its own design engineer that the failure to place a guard on this product was likely to lead to injury. When "[i]mpatient B&D officials, however, ordered [the designer] to proceed with the saw's development without the right lower blade guard", and when Black & Decker took steps to discourage Underwriters Laboratories from promulgating a product safety standard which would have required the fitting of this guard to the saw (App. 17a-18a), the Court of Appeals found that the award of punitive damages in the case before it fit well within the Illinois criteria for the imposition of those damages. (App. 19a)

Contrary to the claim presented by Black & Decker in its petition, the standard for review of punitive damages under Illinois law, as adopted by the Court of Appeals in this case, is not "constitutionally deficient" as it pro-

vides far more than the "full panoply of Alabama-style due process protections" noted in *Haslip*. Further, the basis upon which the Court of Appeals chose to reduce punitive damages from $10,000,000 to $5,000,000, based not upon the simple fact of Black & Decker's abundant net worth, but as reflecting its patent misconduct and as representing only a small percentage of one year of profit derived from the sale of these defective products, establishes that the Court of Appeals in this case applied standards that met *and exceeded* standards measured under Alabama law and *Haslip*.

Black & Decker's review of Illinois law is particularly sparse, and rests on quotes taken out of context rather than reflecting an effort to give this Court a true picture of how that jurisdiction treats punitive damages. A far better picture of how Illinois treats these awards may be seen in the *Loitz* decision and the cases cited in *Loitz* which show that Illinois courts have unhesitantly vacated punitive damage awards or cut them dramatically under standards which exceed those noted in *Haslip*. Illinois very clearly recognizes that punitive damages must be subject to intense review by the courts. That recognition was adopted by the Court of Appeals in this case, which used appropriate and reasonable factors to review and later reduce this award of punitive damages to serve the *same* purposes recognized by the Alabama courts and approved by this Court in *Haslip*.

III.

BLACK & DECKER WAS NOT DENIED ITS RIGHT TO TRIAL BY JURY THROUGH THE ALLEGED FAILURE TO PROVIDE JURY INSTRUCTIONS WHICH IT NEVER TENDERED, WHICH IT FAILS TO DELINEATE BEFORE THIS COURT, AND IN LIGHT OF THE FACT THAT IT ADMITTEDLY AGREED TO THE MANNER IN WHICH THIS JURY WAS INSTRUCTED ON THE QUESTION OF PUNITIVE DAMAGES.

The final argument presented by Black & Decker is that it was denied it right to trial by jury when the Seventh Circuit "applied de novo the post-verdict review criteria prescribed [by Illinois law] [since these instructions] were not included in the District Court's punitive damage jury instruction." (Pet. 13) Black & Decker asserts that this Court's decision in *Haslip* requires that a "district court sitting in diversity must instruct the jury on the totality of the substantive state law of punitive damages." (Pet. 14)

This argument flies in the face of Black & Decker's concession in footnote 2 at page 4 of its petition that the parties "agreed upon the following punitive damage jury instruction that the district court submitted to the jury." Further, Black & Decker *never* submitted any additional jury instructions before the District Court. Black & Decker also has *never* formulated a jury instruction either before the Court of Appeals, in its Petition for Rehearing before the Court of Appeals, or before this Court in its request for review. Apparently, Black & Decker believes that the District Court should have drafted these instructions *sua sponte* in order to conform to a formulation of *Haslip* which Black & Decker has never bothered to articulate up to and including its presentation before this Court.

The "*Hazelwood*" factors which Black & Decker insists should have been present in the jury instructions are in fact contained in content in the actual instruction proffered to the jury. If any of these factors were missing,

or Black & Decker wished to have any additional items included, it would have been a simple task for its counsel to present that request to the District Court. His failure to do so, and Black & Decker's failure to point with specificity to any omission in the tendered instruction or supply any alternative jury instruction, clearly waives its right to present this argument as a basis for review by this Court.

Parties can and should raise objections to jury instructions in a timely fashion before the purportedly-erroneous instruction is given to the jury. By waiting for years after this instruction was tendered to raise its present complaints, plaintiff respectfully urges that Black & Decker's argument in this regard falls squarely within the prohibition against "tardily raised" arguments of this nature as pointed out by this Court in *Haslip*.

CONCLUSION

The Petition for a Writ of Certiorari presented by Black & Decker, Inc. should be denied by this Court.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JERRY L. ROSS,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	No. 90 C 4439
	)	
BLACK AND DECKER, INC.,	)	JUDGE MAROVICH
	)	
Defendant.	)	Magistrate Rosemond

DEFENDANT, BLACK & DECKER (U.S.) INC.'s MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 50(b) AND MOTION FOR NEW TRIAL IN THE ALTERNATIVE TO MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 50(b)(d) and 59

NOW COMES the Defendant, BLACK & DECKER (U.S.) INC.'s ("BLACK & DECKER") by its attorneys, FRENCH KEZELIS & KOMINIAREK, P.C., and, pursuant to Federal Rules of Civil Procedure 50(b) and 59, moves the Court to enter judgment notwithstanding the verdict of the jury in favor of the Plaintiff or, in the alternative, in the event that said motion be denied, that a new trial be granted or, in further alternative in the event said motions are denied, the Court strike the punitive damages and enter a remititur and for grounds for said motions says:

I

1. Defendant, BLACK & DECKER moves that the Court enter judgment notwithstanding the verdict of the jury against the Plaintiff and in favor of the Defendant and in support of said motion says:

(a) That the verdict of the jury is contrary to the law.

(b) That the verdict of the jury is contrary to the evidence.

(c) That the verdict of the jury is contrary to the law and the evidence.

2. The Court erred in failing to direct a verdict in favor of the Defendant at the close of the evidence introduced by the Plaintiff in that as a matter of law Plaintiff failed to introduce any evidence which would justify the submission of this case to a jury.

3. That the Court erred in failing to direct a verdict in favor of the Defendant at the close of all the evidence.

4. That the Court erred in submitting this cause to the jury on the question of the liability of the Defendant to the Plaintiff.

5. That the Court erred in submitting this cause to the jury on the question of the Defendant's actions or of the product proximately causing injury to the Plaintiff.

6. That the Court erred in submitting to the jury the question of punitive damages.

7. In a diversity action such as the case at bar, State law governs disposition of a motion for judgment notwithstanding the verdict. *F.W. Hempel & Co., Inc. v. Metal World, Inc.*, 721 F.2d 610 (7th Cir. 1983). In Illinois, a judgment notwithstanding the verdict should be entered

in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill.2d 494, 329 N.E.2d 504 (1967).

8. On May 4, 1983, the Plaintiff, Jerry L. Ross, used a DeWalt 10 inch power miter box electrical saw manufactured by Black & Decker in July of 1978. At the time of manufacture, no specific industry standards or other standards governed the design of miter box saws. This saw met *all* electric portable tool requirements. The power miter box had not been altered since its manufacture. The Plaintiff operated the saw at a 45 degree angle to the right (facing the operator's view) and held the piece of wood being cut to the right of the blade with his left hand and brought the blade down with his right hand. As he completed the cut, Plaintiff's lower arm contacted the rotating teeth of the blade, resulting in a near amputation of the Plaintiff's left hand.

9. A stationary metal enclosure prevented inadvertent contact to the upper portion of the saw blade. A clear plastic guard which extended down the left side of the blade prevented contact to the lower portion of the saw blade on the left side. The motor of the saw prevented contact with the blade on the lower right side. In this particular instance, the evidence overwhelmingly establishes that the Plaintiff brought his hand straight up underneath into the blade.

10. That Plaintiff at trial claimed the product was unreasonably dangerous because it lacked a right lower blade guard. As the evidence overwhelmingly demonstrates, the manner in which the Plaintiff brought his hand into the blade would not have been prevented by a right lower

blade guard. Hence, there was no injury resulting from a product which was unreasonably dangerous. In Illinois, to prevail on product liability, an injured party must demonstrate that he was injured, that the injury resulted from a condition of the product, that the condition was unreasonably dangerous, and that the unreasonably dangerous condition existed at the time the product left the Defendant's control. *Aetna Insurance v. Emilio Brothers Meat Co.*, 182 Ill. App.3d 863, 538 N.E.2d 707 (1989).

11. That in further support for its motion for a directed verdict or, in the alternative, a judgment notwithstanding the verdict or, in the alternative, a new trial, Defendant incorporates by reference its memorandum in support of its post-trial motions.

WHEREFORE, the Defendant BLACK & DECKER (U.S.), INC., moves that this Court vacate the judgment entered in this cause on May 31, 1991, and vacate and set aside the verdict of the jury herein, and enter judgment notwithstanding the verdict against the Plaintiff and in favor of the Defendant.

II.

In the alternative, in the event that the motion of the Defendant for judgment notwithstanding the verdict be denied, Defendant moves that this Court vacate and set aside the judgment entered in this cause on May 31, 1991, vacate and set aside the verdict of the jury herein and grant a new trial to the Defendant and as grounds for said motion says:

1. That the verdict of the jury is contrary to the law and the evidence.

2. That the verdict of the jury is contrary to the clear weight of the evidence. *Foster v. Continental Can Corp.*, 783 F.2d 735 (7th Cir. 1986).

3. That in support of the arguments that the verdict is contrary to the clear weight of the evidence, Defendant adopts hereto the arguments raised in its motion for judgment notwithstanding the verdict and by incorporated reference, the memorandum in support of post-trial motions.

4. That the Honorable Court erred when it quashed the notice of BLACK & DECKER of the deposition of a witness who could not attend trial. At trial, Plaintiff's expert, Mr. Clark, testified to a conversation with Robert Ruth concerning the design of the miter box saw in issue. According to Mr. Clark, he suggested that a right lower blade guard be attached to the saw before production. Mr. Ruth allegedly rejected the suggestion.

5. Mr. Ruth retired from BLACK & DECKER and his whereabouts was unknown to BLACK & DECKER and its attorneys until only recently. Upon locating him, Defendant learned that Mr. Ruth has cancer and that his condition is terminal. Further, Mr. Ruth now receives chemotherapy every single day near his home in Lancaster, Pennsylvania and, because of his medical condition and ongoing chemotherapy, he is unable to travel to Chicago in person in order to testify. This Court quashed the notice of the deposition of Mr. Ruth and thus prejudiced the Defendant from preserving his testimony and from presenting his testimony during the trial. This testimony was needed to rebut the testimony of Mr. Clark.

6. In the alternative, this Honorable Court erred in denying Defendant's arrangements to have Mr. Ruth's testimony broadcast live over closed circuit television from

Lancaster, Pennsylvania to a location only three blocks from the courthouse. The facility was adequate to accommodate the judge, jury, court reporters and all attorneys. BLACK & DECKER further agreed to bear the entire expense of this closed circuit broadcast. Closed circuit transmission in the courthouse would be impossible due to a lack of necessary telephone hook ups. But again, Defendants were severely prejudiced by not being allowed to present Mr. Ruth's testimony during the trial.

7. That this Court erred in allowing the Plaintiff to file interrogatories after discovery had been closed and to compel this Defendant to answer said interrogatories within seven days even though discovery had been closed.

8. That this Honorable Court erred in allowing Plaintiff to notice up the deposition and proceed with the deposition of witnesses after discovery had closed.

9. That this Court erred in permitting testimony as to standards which were promulgated after the manufacture of this machine. In Illinois, to be admissible, evidence of standards promulgated by industry, trade or regulatory groups or agencies must be relevant in terms of both time and conduct involved. *Murphy v. Messerschmidt*, 69 Ill.2d 79, 84, 368 N.E.2d 1299 (1977); *Ruffiner v. Material Service Corp.*, 116 Ill.2d 53, 56, 506 N.E.2d 581 (1987). Admission of the subsequently drafted, released and promulgated industry standards violated the rules of *Murphy* and *Ruffiner*. Such evidence was not relevant in time as these standards were not even in existence at the date of the manufacture of the saw. Accordingly, admission of these standards constituted reversible error. BLACK & DECKER can be held accountable only for what it knew or should have known at the time of manufacture. This error affected not only the liability verdict, but also punitive damages.

10. Similarly that this Court erred in permitting testimony on accidents which occurred not only after manufacture, but after this accident.

11. That this Court erred in permitting testimony of evidence of another manufacturer's saw even though that saw was made many years after the accident.

12. That this Court erred in permitting testimony of standards, accidents, or other products all occurring after the manufacture of the BLACK & DECKER saw without any limiting instruction to the jury.

13. That this Court erred in allowing testimony and photographs of injuries of another accident involving a BLACK & DECKER miter box saw.

14. That this Court erred in permitting the direct testimony from another case which dealt with a nonissue and had no probative value to the issues in this case. That testimony dealt with record retention and record destruction. Further, this witness had been listed in the pre-trial order as a live witness, but Plaintiff never requested him prior to trial. Further, Defendant, BLACK & DECKER, stated that this witness was available and under its control. If the Court so ordered, they would have produced him pursuant to the Court's order.

15. That this Court erred by interrupting and questioning the plaintiff's expert during defendant's cross-examination. During said cross-examination, counsel for BLACK & DECKER began to elicit testimony which impeached and contradicted the testimony of the Plaintiff's expert concerning a conversation he had with other employees at BLACK & DECKER. Without waiting for the defense counsel to finish his questioning, or for the Plaintiff to conduct a redirect, this Court started questioning the wit-

ness himself which destroyed the effect of the cross-examination by defense counsel.

16. That this Court erred during direct examination of BLACK & DECKER's expert by preventing the expert from fully apprising the jury of all of its qualifications and credentials. Instead, the Court cut this testimony short and instructed defense counsel to get to the issues. This had the effect of discrediting and belittling the expert.

17. That this Court erred in its charge to the jury by failing to give instructions on the defense of misuse of a product in a strict liability situation.

19. That this Court also erred in its charge to the jury by charging the jury on the issue of punitive damages.

21. That the Court caused the jury to become prejudiced and biased against the Defendant by advising defense counsel in front of the jury that he was "tired" of technical objections and that the jury knew what the evidence was.

20. That prejudice and bias against the Defendant prevented his Defendant from having a fair trial and due process of the law.

21. That the weight of the evidence clearly establishes that the power miter box was not unreasonably dangerous nor unsafe when put to a reasonable and foreseeable use when considering its nature and function.

22. That the weight of the evidence establishes a clear lack of any evidence that the 10 inch power miter box saw was a proximate cause of the Plaintiff's injuries.

23. That the verdict of the jury as to general damages is grossly excessive and unreasonable under the evidence.

24. That the verdict in the sum of $2,000,000 is punitive in character and contrary to the Court's rulings.

25. That verdict is so excessive that it must shock the conscience of the Court.

26. That the weight of the evidence clearly establishes the lack of any evidence supporting a verdict in the sum of $2,000,000.

27. That the Court erred in allowing the jury to consider punitive damages inasmuch as the weight of the evidence clearly establishes that the Defendant did not have a flagrant disregard for the Plaintiff or other consumers and users of the miter box saw. Hence, as a matter of law, the Court should never have submitted punitive damages to the jury.

28. That the verdict of the jury on punitive damages is contrary to the law.

29. That the verdict of the jury on punitive damages is contrary to the evidence.

30. That the verdict of the jury on punitive damages is contrary to the law and the evidence.

31. That the verdict of the jury on punitive damages is contrary to the clear weight of the evidence.

32. That the verdict of the jury as to punitive damages is grossly excessive and unreasonable under the evidence.

33. That the verdict of the jury as to punitive damages must shock the conscious of the Court.

34. That the weight of the evidence clearly establishes the lack of any evidence supporting a verdict of punitive damages in the sum of $10,000,000.00.

35. That in support of the foregoing, Defendant incorporates by reference its Memorandum in Support of the Post-Trial Motion.

WHEREFORE, the Defendant, BLACK & DECKER (U.S.), Inc., moves that this Court vacate the judgment entered in this cause on May 31, 1991, and vacate and set aside the verdict of the jury herein, and enter an order granting the Defendant a new trial on all issues.

III

In the further alternative, in the event that the motions of the Defendant for judgment notwithstanding the verdict and for a new trial on all issues and a new trial on damages only be denied, the Defendant moves that this Court vacate and set aside the judgment entered in this cause on May 31, 1991, as to punitive damages alone, vacate and set aside the verdict of the jury herein as to punitive damages, and enter a remititur.

/s/ ALGIMANTAS KEZELIS
Algimantas Kezelis, Attorney for
Defendant, Black & Decker (U.S.), Inc.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JERRY L. ROSS,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	No. 90 C 4439
	)	
BLACK AND DECKER, INC.,	)	JUDGE MAROVICH
	)	
Defendant.	)	Magistrate Rosemond

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT, BLACK & DECKER (U.S.), INC.'s, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 50(b) and MOTION FOR NEW TRIAL IN THE ALTERNATIVE TO MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 50(b)(d) and 59

NOW COMES the Defendant, BLACK & DECKER (U.S.), INC., and in support of its various post-trial motions, submits the following Memorandum of Law:

I

THE COURT SHOULD ENTER A JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, A NEW TRIAL ON THE ISSUE OF LIABILITY

The instant case arises out of an accident occurring on May 4, 1983. The Plaintiff brought his left hand into

the rotating teeth of the saw blade of a DeWalt 10 inch power miter box electrical saw manufactured by BLACK & DECKER in July of 1978. Plaintiff filed a lawsuit based on strict products liability and also sought punitive damages. This action is based upon diversity. In Illinois, to prevail in a product liability action, an injured party must demonstrate that he was injured, that the injury resulted from a condition of the product, that the condition was unreasonably dangerous, and that the unreasonably dangerous condition existed at the time the product left the Defendant's control. *Aetna Insurance v. Emilio Brothers Meat Co.*, 182 Ill. App.3d 863, 865-866, 538 N.E.2d 707 (1989). The evidence in this case overwhelmingly demonstrates that this Court should have granted Defendant's Motion for a Directed Verdict or, in the alternative, enter a judgment notwithstanding the verdict. In the alternative, the Court should enter an order granting Defendants a new trial on all issues. In a diversity action such as the case at bar, state law governs the disposition of a motion for a judgment notwithstanding the verdict. *F.W. Hempel & Co., Inc. v. Metal World, Inc.*, 721 F.2d 610, 613 (7th Cir. 1983). In Illinois, a judgment notwithstanding the verdict should be entered in those cases in which all the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill.2d 494, 510, 329 N.E.2d 504 (1967). In the alternative, for the new trial, the standard for reviewing a motion for a new trial is controlled by federal law. *Foster v. Continental Can Corp.*, 783 F.2d 731, 735 (7th Cir. 1986). A new trial may be granted only if the verdict is against the clear weight of the evidence. *Foster*, 783 F.2d at 735.

The verdict in favor of the plaintiff is against the manifest weight of the evidence for the following reasons: (a)

Plaintiff admitted that he did not actually recall what happened at the time of the accident, (p. 300 of trial transcript); (b) Plaintiff's expert, Mr. Kalin, agreed that the plaintiff's arm contacted the teeth of the blade from the bottom, and thus, the right lower guard would have had no effect; (c) Dr. Ericksson, the treating physician, testified as to a straight cut amputation; and (d) That the photographs of the injuries showed a clean 90 degree cut through the arm, which physically, could not be prevented by a right lower blade guard.

II

PUNITIVE DAMAGES SHOULD NEVER HAVE BEEN SUBMITTED TO THE JURY AND IN THE ALTERNATIVE, THEY WERE EXCESSIVE

In a diversity action, State law determines whether punitive damages are allowed. *In Re Air Crash Disaster near Chicago*, 644 F.2d 594, 605-06 (7th Cir. 1981). In Illinois punitive damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts wilfully or with such gross negligence as to indicate a wanton disregard of the rights of others. *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 186, 384 N.E.2d 353 (1978). In a products liability situation, the standard is whether the manufacturer's conduct constituted flagrant disregard for public safety. *J.I. Case Co. v. McCartin-McAuliffe*, 118 Ill.2d 447, 453, 516 N.E.2d 260 (1987). When punitive damages are assessed, they are allowed in the nature of punishment and as a warning and example to deter the defendant and others from committing like offenses in the future. *Kelsay*, 74 Ill.2d at 186. Further, in Illinois, courts must exercise caution to see that punitive damages are not awarded improp-

erly or unwisely. *Cornell v. Langland*, 109 Ill. App.3d 472, 475, 440 N.E.2d 985 (1982).

In the case at bar, Plaintiff relied upon evidence of post-occurrence standards, accidents, and modifications for his award of punitive damages. Only prior occurrences are relevant to establish a plaintiff's claim for punitive damages. *Moore v. Remington Arms Co.*, 100 Ill. App.3d 1102, 111, 427 N.E.2d 608 (1981). In any event, evidence established that BLACK & DECKER had manufactured and sold 106,000 power miter box saws prior to this accident and yet, plaintiff was only able to prove the existence of three actions, including his own injury. As in *Moore* and *Loitz v. Remington Arms Co., Inc.*, 138 Ill.2d 404, 563 N.E.2d 397 (1990), the plaintiff in this case was injured on an open and obvious and inherently dangerous instrumentality. The mere fact that other persons had been injured while using the BLACK & DECKER power miter saw does not in and of itself support the existence of a defect. Here, the low percentage of any accidents while using the power miter box saw is conclusive on the issue that defendants did not act in a wilful and wanton manner towards the plaintiff and consumers in general. *Loitz*, 138 Ill.2d at 420.

Even the plaintiff's expert testimony was insufficient to warrant imposition of punitive damages in this case. Mr. Clark testified to discussing the need for a guard with Mr. Ruth. Yet, the parties stipulated that Mr. Clark no longer worked with BLACK & DECKER at the time this alleged conversation took place. In other words, the conversation never could have possibly occurred. Even assuming, however, that the conversation did take place, punitive damages cannot be awarded to punish or to deter reasonable actions simply because of an error in judgment. *Kohlmeier v. Shelter Insurance Co.*, 170 Ill. App.3d 643,

658, 525 N.E.2d 94 (1988). Testimony that BLACK & DECKER knew that a right lower blade guard may have been feasible to include on the saw does not mean that its judgment not to include the guard was unreasonable. *Loitz*, 138 Ill.2d at 425-26. At that time, and considering the facts that no standards required a right lower blade guard, the motor acted as a guard, and the manner in which the plaintiff's accident occurred, the actions of BLACK & DECKER did not rise to the level of a flagrant disregard for public safety. The low level of accidents also establishes that BLACK & DECKER did not have a flagrant disregard for users.

Certainly, even the testimony of Mr. Clark does not establish that BLACK & DECKER had "bad motives" or flagrantly disregarded the safety of consumers. In determining whether punitive damages are available in a given case, one must look at the defendant's motives, purpose, and state of mind. See *Allabastro v. Cummins*, 90 Ill. App.3d 394, 400, 413 N.E.2d 86 (1980); *St. Ann's Home For The Aged v. Daniels*, 95 Ill. App.3d 576, 580, 420 N.E.2d 478 (1981). (It is not so much the tort committed as the motive and conduct in committing it that is the basis for awarding punitive damages.) While BLACK & DECKER may have foreseen an accident such as the plaintiff's occurring, BLACK & DECKER's conduct cannot properly be characterized as wanton, malicious or oppressive. There is no evidence by which BLACK & DECKER knew or intended injury such as Mr. Ross' to occur.

It should also be noted that the purpose of punitive damages is to act as a deterrent effect as well as to punish. In this instance, since BLACK & DECKER now places the guards upon the saw, there is no need to assess punitive damages to act as a deterrent. Further, it should also be noted that the compensation awarded to all in-

jured plaintiffs would in itself act as a deterrent. This is not the sort of situation where compensatory damages do not act as a deterrent, and in the absence of other effective means of deterrence, punitive damages must be permitted. See, *e.g.*, *Kelsay*, 74 Ill.2d at 186-187.

Moreover, on the basis of the evidence in this case, the amount awarded was improper and bore no reasonable relationship to the conduct involved. The broad range of circumstances that may be taken into account by a jury in making a punitive damage award often invites the imposition of a large sum unrelated to the injury incurred. *Loitz*, 138 Ill.2d at 416. The goal of deterrence is the same in the context of products liability, but the unique concern is to deter manufacturers from placing dangerously defective products into the stream of commerce by making this unprofitable to a more predictable degree than punitive damages. Punitive damages are subject to abuse because they have little or no relation to the actual damages suffered by the plaintiff. *Moore*, 100 Ill. App.3d at 1113. In Illinois, because of their penal nature, punitive damages are not favored in the law and the courts must take caution to see that punitive damages are not improperly or unwisely awarded. *Kelsay*, 74 Ill.2d at 188. In the area of products liability, the susceptibility to abuse makes such control even more necessary. *Moore*, 100 Ill. App.3d at 1114.

Therefore, judicial scrutiny should be exercised in this case first, as to the imposition of punitive damages at all, and secondly as to excessive punishment. In the event that this Court does believe that punitive damages were properly allowed, the Court should still enter a remittitur to reduce the level of punishment to an appropriate level. This case does not establish a manufacturer's lack of concern for public safety, a spirit of utter indifference as to

whether the product might cause unnecessary injuries nor an overall magnitude of danger to the public. In short, BLACK & DECKER was punished for failing to install a guard that the company, in good faith, did not believe was needed. There has been no real evidence that it had any actual knowledge of the claimed defect. Since a saw is an inherently dangerous instrumentality, the mere occurrence of this accident or others, without more, does not establish outrageous misconduct or some other basis sufficient to warrant the imposition of punitive damages.

III

ANY EVIDENCE CONCERNING STANDARDS, POST-MANUFACTURE MODIFICATIONS, OR POST-ACCIDENT OCCURRENCES WERE INADMISSIBLE

In the case at bar, the Court allowed testimony concerning any standards promulgated after the date of the manufacture of the saw in question. In a similar manner, the Court allowed testimony concerning post-manufacture accidents, post-manufacture modifications etc.

The standards in question did not go into effect until well after July, 1978, the date of the manufacture of the miter box saw at issue. Allegedly, this evidence proved that the saw is unreasonably dangerous and that a safer, feasible alternative design existed. Admission of such evidence is not allowed under Illinois law. To be admissible, standards must be relevant in terms of both time and conduct involved. *Ruffiner v. Material Service Corp.*, 116 Ill.2d 53, 58, 506 N.E.2d 581, 584 (1987). Evidence of standards promulgated by industry, trade or regulatory groups subsequent to the date of the manufacture of the miter box saw would not be relevant in time, as these standards

were not even in existence at the date of the manufacture of the saw. See *Murphy v. Messerschmidt*, 68 Ill.2d 79, 84, 368 N.E.2d 1299 (1977). The admission of this subsequently drafted, released and promulgated industry standards violated the rules of *Murphy* and *Ruffiner*.

The Court relied upon cases such as *Jones v. Black & Decker Manufacturing Co.*, 22 Ill. App.3d 401, 559 N.E.2d 1004 (1990); *Pyatt v. Engel Equipment, Inc.*, 117 Ill. App. 3d 1070, 309 N.E.2d 225 (1974); *Turney v. Ford Motor Co.*, 94 Ill. App.3d 678, 418 N.E.2d 1079 (1981); and *Seward v. Griffin*, 116 Ill. App.3d 749, 452 N.E.2d 558 (1983). Those cases do not stand for the proposition that a plaintiff may use subsequently promulgated standards to show that a product was unreasonably dangerous at the time of manufacture. In *Pyatt* and *Turney*, the standards in question existed at the time of manufacture and therefore, were time relevant. Those cases dealt with whether standards directed to employers could be used by manufacturers to establish that the product was not unreasonably dangerous. In *Jones* and *Seward*, post-manufacture standards did not require the suggested safety feature and therefore were relevant because it would be illogical to hold a manufacturer responsible for failing to sell a product without certain precautionary measures when, years later, government and industry standards still did not require them.

The opposite is not true. Subsequent experience or technological changes may dictate changes in design standards after the manufacture of a product. A manufacturer, however, cannot be held responsible for the product manufactured before the change in the standard. Holding a product not in violation of a standard when manufactured, to a standard issued after manufacture, is the same as convicting a person under an *ex post facto* law.

Turning to the post-manufacture modifications, the Court also allowed evidence that BLACK & DECKER *did* add a right lower guard blade once required to do so under the UL standards. This too was error. Federal Rule of Evidence 407 prohibits evidence of subsequent remedial measures. Further, design changes developed after the manufacture of the product in question are irrelevant to the reasonableness of the design at the time of manufacture. *Roberts v. Harnischfeger Corp.*, 901 F.2d 42, 44 (5th Cir. 1989). The only possible exception to Rule 407 would be feasibility of precautionary measures; Defendants, however, admitted that the guard was feasible, just unnecessary. The introduction of such evidence, either by way of testimony or by showing the jury later model miter boxes would be prejudicial without having any probative value. *See, e.g., Sutkowski v. Universal Marion Corp.*, 5 Ill. App.3d 313, 281 N.E.2d 749 (1972); *Northern Trust Col. v. The Upjohn Co.*, Nos. 89-2165, 90-2244, 90-2357 Slip Opinion at 14 (Illinois Appellate Court, First District, Opinion issued April 26, 1991) (postoccurrence warnings are inadmissible).

In a similar manner, Plaintiff should not have been allowed to mention any prior or subsequent accidents involving the product in question. Any mention of post-accident events would have no probative value of notice of defect, feasibility or to punitive damages. Any mention of the post-accident occurrences would only serve to prejudice and inflame the jury without providing any information regarding alleged notice to the Defendant. Hence, all evidence of the Stukel accident should have been barred.

In order to show that a manufacturer had prior knowledge of similar accidents, a showing must be made that the other accidents were substantially similar to those sur-

rounding the accident in question. *Tripp v. Bureau Service Corp.*, 62 Ill. App.3d 998, 1006, 379 N.E.2d 324 (1978). While similar prior accidents may be admissible, there is no showing that any of the accidents which Plaintiff submitted were substantially similar. The evidence clearly establishes that each of these accidents had different circumstances, different cut types, different saws, different defects, even different time frames with regard to when the products were designed and manufactured. As the circumstances and similarity of the other accidents become less similar, the probative value decreases, but the danger of unfair prejudice remains. *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1268 (7th Cir. 1988).

IV.

THE TRIAL COURT ERRED IN QUASHING THE DEPOSITION OF MR. RUTH

Mr. Ruth, a former BLACK & DECKER employee, was listed on the Pretrial Order witness list. Plaintiff's expert allegedly had a conversation with Mr. Ruth in which he suggested that a right lower blade guard be attached to the power mitre box saw—a suggestion Mr. Ruth allegedly rejected. Mr. Ruth's testimony would have refuted Clark's explanation as not only false, but impossible to have occurred.

Three weeks before trial, BLACK & DECKER located Mr. Ruth, but learned that he has cancer, which is probably terminal. Further, Mr. Ruth now receives chemotherapy every day near him home in Lancaster, Pennsylvania. Because of his medical condition and ongoing chemotherapy, he is unable to travel to Chicago in person to testify. This Court quashed the notice of the deposition of Mr. Ruth and thus prejudiced the Defendant from pre-

serving his testimony and from presenting his testimony during the trial.

In light of the Court's action, BLACK & DECKER arranged to have Mr. Ruth's testimony broadcast live over closed circuit television from Lancaster, Pennsylvania, to a location only three blocks from the courthouse. The facility was adequate to accommodate the judge, jury, court reporters and all attorneys. BLACK & DECKER further agreed to bear the entire expense of this closed circuit broadcast, since such transmission in the courthouse would be impossible due to a lack of necessary telephone hookups.

Under Rule 32(a)(3), defendants attempted to submit Mr. Ruth for his deposition prior to trial. Because of his grave illness, his location outside the subpoena power of this Court, and because of the critical nature of his testimony, the denial of defendants' attempts to preserve his testimony was extremely prejudicial. See *Charles v. Wade*, 665 F.2d 661 (2nd Cir. 1982), *cert. denied*, 460 U.S. 1036, 103 S. Ct. 1426, where the district court improperly denied a motion to take a deposition after discovery had closed for the purpose of providing the deposition in lieu of live testimony.

The above stated error becomes more egregious when viewed in light of the Court allowing the plaintiff to file interrogatories and to compel this defendant to answer said interrogatories within seven days even though discovery had been closed.

V

THE TESTIMONY OF MR. SAFFELL FROM AN UNRELATED TRIAL, NOT USED AS IMPEACHMENT, NOT LISTED TO THE PRE-TRIAL ORDER WAS IMPROPERLY ALLOWED

Local Rule 5.00 governs the admissibility of testimony. Each party shall list which witnesses will be called to testify live at trial. Absent good cause shown, a witness who is not listed cannot be called except as a rebuttal witness. Rule 5.00(d). Plaintiffs listed Mr. Saffell as a witness who would be called live. Over objection, defendants would have produced Mr. Saffell live as requested or ordered by the Court. No such request was ever made.

Instead, plaintiffs read portions of his trial testimony from another unrelated trial in lieu of calling him live. This was not rebuttal nor impeachment since it was offered in plaintiff's case in chief.

If a party is planning to read parts of deposition or trial testimony, it is the burden of party intending to read that testimony to designate that testimony in the pretrial order. It is otherwise unavailable for evidence at trial. Rule 5.00(f). Such designations allow the responding party to object to or offer rebuttal testimony to such designated testimony.

No designation of the prior trial testimony of Mr. Saffell was ever provided, nor disclosed on any deposition list. Defendants had no opportunity to object to the testimony as provided in Rule 5.0. Further, BLACK & DECKER would have produced Mr. Saffell live at trial once ordered to do so. As an employee under the control of the defendant, he was never "unavailable" as defined in Federal Rule Civ. Pro. Rule 32(a) or Federal Rule of Evidence 804.

Testimony by deposition is less desirable than oral testimony and should be used only if the witness is unavailable to testify in person. *Salsman v. Witt*, 466 F.2d 76, 79 (10th Cir. 1972). Saffell's prior trial testimony from a dissimilar case, not only violated Local Rule 5.00, but effectively precluded defendants from providing a full background of the circumstances surrounding that testimony, from explaining the meaning of that testimony and from offering rebuttal testimony. Instead, plaintiff was able to highlight parts of his prior testimony to their best advantage, out of context and without warning. This is neither fair nor equitable and was extremely prejudicial to defendant. Had Saffell been allowed to testify live, as described in the Pretrial Order, plaintiff would have had a full and fair opportunity to question him, while the prejudice to the defendant would have been minimized.

If prior testimony is to be used at pretrial, all exhibits used at the previous setting must be available at the retrial. No such attempt was made here. Finally, said testimony was irrelevant since it dealt entirely with record retention and destruction and did not relate to the relevant issues in this case. The facts in the other trial were significantly different than this case.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Defendant, BLACK & DECKER, prays that this Court grant it a judgment on all issues notwithstanding the verdict, or in the alternative, a new trial, or in the alternative, a remittitur.

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